# February 2003

# Update: Sexual Assault Benchbook

## CHAPTER 2

## The Criminal Sexual Conduct Act

### 2.5 Terms Used in the CSC Act

#### I. "Force or Coercion"

##### 1. Actual Application of Physical Force or Physical Violence

Insert the following language at the end of Section 2.5(I)(1) on p 70:

> In *People v Alter*, ___ Mich App ___ (2003), the Court of Appeals found sufficient evidence of the actual application of physical "force" under CSC II (force or coercion), where the defendant-therapist, during a therapy session with the victim, unbuttoned the victim's blouse, fondled her breast, and placed her hand on his penis—all without obtaining consent. Alternatively, the Court found sufficient evidence of "coercion," since "the defendant, as the victim's therapist, engaged in sexual contact with the victim through the use of an unethical or unacceptable manner of treatment."

# CHAPTER 2

# The Criminal Sexual Conduct Act

## 2.5 Terms Used in the CSC Act

### I. "Force or Coercion"

#### 4. Medical Treatment or Examination in a Manner Medically Recognized as Unethical or Unacceptable

Insert the following language at the end of Section 2.5(I)(4) on p 73:

In *People v Alter*, ___ Mich App ___ (2003), the Court of Appeals upheld defendant's two CSC II (force or coercion) convictions, rejecting his sufficiency of the evidence attacks.* In *Alter*, the facts adduced at trial established that defendant, in his capacity as a therapist, counseled the victim for approximately ten years, from 1984 to 1994, regarding issues of alcoholism, depression, eating disorders, nervous breakdowns, marital infidelity, and so-called "failures" in life. During two therapy sessions (on January 9, 1993 and May 5, 1993), defendant fondled the victim's breast and placed her hand on his penis. The therapy sessions continued but were switched, at defendant's request, to the evenings and at hotels, where during the last four to five years of therapy the defendant met with the victim once a week to have sex with her. He claimed the victim's "failures" in life stemmed from her inability to make men happy. The victim "totally trusted" defendant but denied any romantic feelings toward him. After discontinuing therapy with the defendant, the victim still continued to see him "until she reported [his] conduct to the state police and licensing agency." On appeal, defendant argued, among other things, insufficiency of the evidence to sustain his two CSC II (force or coercion) convictions. The Court of Appeals disagreed, finding sufficient evidence on two elements of the "force or coercion" definition: (1) where the actor overcomes the victim through the actual application of physical force or physical violence; and (2) where the actor engages in unethical or unacceptable medical treatment of the victim:

> "Contrary to defendant's claim, there was sufficient evidence to convict him of the two charged counts of CSC II under MCL 750.520c(1)(f) [sexual contact by force or coercion and personal injury]. With respect to the charged conduct of May 5, 1993, the victim testifed that while she and defendant were discussing her husband's verbal abuse during their session, defendant unbuttoned her blouse and began fondling her breast. She further testified that while

*The jury also convicted defendant of two counts of sexual intercourse under the pretext of medical treatment, MCL 750.90, but the Court of Appeals reversed these convictions, finding, contrary to the trial court's opinion, that they are not lesser included offenses of CSC I.

fondling her breast, he placed her hand on his penis and told her that if she would leave her husband she would not feel so 'trapped.' The victim denied ever giving defendant permission to have such sexual contact with her. This was sufficient evidence that defendant used actual force to accomplish sexual contact. . . . Alternatively, the coercion element was satisfied because defendant, as the victim's therapist, engaged in sexual contact with the victim through the use of an unethical or unacceptable manner of treatment. . . .

"As to the charged conduct occurring on January 9, 1993, the victim testifed that while again fondling her breast as the two talked during a session, defendant took her hand and placed it on his penis, then moved her hand about his genitals in a manner causing her to fondle his penis. The victim denied that she gave defendant permission to fondle her breast or have her fondle his penis. As with the evidence concerning the previously discussed conduct, this was sufficient evidence that defendant used actual force or an unethical or unacceptable manner of treatment to accomplish sexual contact." *Id*. at ___. [Citations omitted.]

# CHAPTER 2

# The Criminal Sexual Conduct Act

## 2.5 Terms Used in the CSC Act

### R. "Personal Injury"

#### 4. "Causation" of "Personal Injury"

Insert the following text at the end of Section 2.5(R)(4) on p 94:

> Relying on *Brown*, *supra* [*People v Brown*, 197 Mich App 448, 451 (1992)], the Court of Appeals in *People v Alter*, ___ Mich App ___ (2003), upheld the following supplemental jury instruction in a CSC II case where the defendant, as the victim's therapist, fondled the victim's breasts and placed her hands on his penis during therapy sessions:
>
> > "[T]he prosecution does not have to show that defendant's conduct was the only cause of the complainant's mental anguish. If you find that the complainant was especially susceptible to the injury at issue, the special susceptibility does not constitute an independent cause freeing defendant from guilt. The prosecution has sustained its burden of proof if you find that defendant was the cause of at least part of the victim's total injury." *Id*. at ___.
>
> Because defendant did not object to the foregoing supplemental instruction at trial, the Court found no plain error by the trial court when it incorporated this supplemental instruction with other jury instructions on personal injury/mental anguish contained in CJI2d 20.9(2) and (3). *Id*. at ___.

# CHAPTER 2

# The Criminal Sexual Conduct Act

## 2.6 Lesser-Included Offenses Under the CSC Act

### C. Appellate Court Determination of Lesser Included Offenses

Insert the following bullet at the end of Section 2.6(C) on p 111:

F *People v Alter*, ___ Mich App ___, ___ (2003) (sexual intercourse under pretext of medical treatment, MCL 750.90, is not a necessarily included lesser offense of either CSC I, MCL 750.520b(1)(f)(i) [sexual penetration by force or coercion, i.e., overcoming victim through actual application of physical force, and personal injury], or CSC I, MCL 750.520b(1)(f)(iv) [sexual penetration by force or coercion, i.e., engaging in unethical or unacceptable medical treatment recognized as unethical or unacceptable, and personal injury]).

# CHAPTER 3

# Other Related Offenses

## 3.15 Gross Indecency – Between Males, Between Females, and Between Members of the Opposite Sex

### D. Pertinent Case Law

#### 3. "Public" or "Private" Place

Insert the following language after the second full paragraph in subsection 3.15(D)(3) on p 159:

> A rented hotel or motel room is not a "public place." See *People v Favreau*, ___ Mich App ___ (2003), where the Court of Appeals reversed defendant's disorderly conduct conviction under MCL 750.167(1)(e), because defendant created the objectionable noise from within his hotel room, which, under *Lino*, *supra* [*People v Lino*, 447 Mich 567 (1994)], is not a "public place": "[E]ven if *Lino* stands for the proposition that 'public place' is generally given a broad definition, it also clearly stands for the proposition that a hotel or motel room is not a public place." *Favreau*, at ___. In so doing, the Court expressly rejected as insufficient the prosecutor's argument that defendant created noise that spilled into a public place. *Id*. at ___.

# CHAPTER 3

# Other Related Offenses

## 3.16 Indecent Exposure

### D. Pertinent Case Law

#### 3. Indecent Act Need Not Be Witnessed

Insert the following language at the end of subsection 3.16(D)(3) on p 162:

> A rented hotel or motel room is not a "public place." See *People v Favreau*, ___ Mich App ___ (2003), where the Court of Appeals reversed defendant's disorderly conduct conviction under MCL 750.167(1)(e), because defendant created the objectionable noise from within his hotel room, which, under *Lino*, *supra* [*People v Lino*, 447 Mich 567 (1994)], is not a "public place": "[E]ven if *Lino* stands for the proposition that 'public place' is generally given a broad definition, it also clearly stands for the proposition that a hotel or motel room is not a public place." *Favreau*, at ___. In so doing, the Court expressly rejected as insufficient the prosecutor's argument that defendant created noise that spilled into a public place. *Id*. at ___.